

NO. 38606-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BRESLER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 SEP -2 PM 3:04
STATE OF WASHING ON
BY  DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00292-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

James Reese
612 Sidney Ave.
Port Orchard, WA 98366

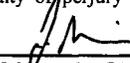
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 2, 2009, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY1

 B. FACTS2

III. ARGUMENT7

 A. THE TRIAL COURT PROPERLY DENIED BRESLER’S UNTIMELY ORAL MOTIONS FOR ARREST OF JUDGMENT AND NEW TRIAL.7

 B. VENUE AND JURISDICTION WERE PROPER IN KITSAP COUNTY.....8

 1. Bresler waived any claim of improper venue by failing to raise a timely objection.9

 2. Venue was proper in Kitsap County.11

 3. The trial court’s jurisdiction was established when Bresler appeared in court and pled not guilty to a properly filed information filed in Kitsap County Superior Court.....11

 C. BRESLER FAILS TO SHOW ANY BASIS FOR SUPPRESSING HIS STATEMENT TO DEPUTY ANGLIN.15

 D. TESTIMONY THAT BRESLER AND DEPUTY ANGLIN HAD A CONVERSATION ABOUT WHY BRESLER HAD BEEN STOPPED AND BRESLER’S COMMENT THAT HE WAS NOT GOING BACK TO JAIL BEFORE SPEEDING OFF WAS SUFFICIENT FOR THE JURY TO FIND THAT BRESLER ACTED WILLFULLY IN ATTEMPTING TO ELUDE THE DEPUTY, REGARDLESS OF BRESLER’S CONTRARY

VERSION OF THE EVENTS20

E. THE TRIAL COURT PROPERLY DECLINED TO
GIVE BRESLER’S KNOWLEDGE INSTRUCTION
BECAUSE IT MISSTATED THE LAW.23

IV. CONCLUSION.....25

TABLE OF AUTHORITIES
CASES

Hoflin v. Ocean Shores,
121 Wn. 2d 113, 847 P.2d 428 (1993).....8

Mercer Island v. Crouch,
12 Wn. App. 472, 530 P.2d 344 (1975).....12

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....16

In re Rice,
118 Wn. 2d 876, 828 P.2d 1086 (1992).....16

State v. Basford,
76 Wn. 2d 522, 457 P.2d 1010 (1969).....20

State v. Copeland,
130 Wn. 2d 244, 922 P.2d 1304 (1996).....7

State v. Dent,
123 Wn. 2d 467, 869 P.2d 392 (1994).....9, 10

State v. Ellis,
48 Wn. App. 333, 738 P.2d 1085 (1987).....24

State v. Ferguson,
76 Wn. App. 560, 886 P.2d 1164 (1995).....17, 18

State v. Green,
94 Wn. 2d 216, 616 P.2d 628 (1980).....21

State v. Gutierrez,
92 Wn. App. 343, 961 P.2d 974 (1998).....8

State v. Hendrickson,
129 Wn. 2d 61, 917 P.2d 563 (1996).....16

<i>State v. Hernandez,</i> 85 Wn. App. 672, 935 P.2d 623 (1997).....	21
<i>State v. Hickman,</i> 135 Wn. 2d 97, 954 P.2d 900 (1998).....	10
<i>State v. Hoffman,</i> 116 Wn. 2d 51, 804 P.2d 577 (1991).....	24
<i>State v. Hughes,</i> 106 Wn. 2d 176, 721 P.2d 902 (1986).....	24
<i>State v. Lord,</i> 117 Wn. 2d 829, 822 P.2d 177 (1991).....	15, 16
<i>State v. McFarland,</i> 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	15
<i>State v. McWatters,</i> 63 Wn. App. 911, 822 P.2d 787 (1992).....	18, 19
<i>State v. Michielli,</i> 132 Wn. 2d 229, 937 P.2d 587 (1997).....	8
<i>State v. Myers,</i> 133 Wn. 2d 26, 941 P.2d 1102 (1997).....	21
<i>State v. Penfield,</i> 106 Wn. App. 157, 22 P.3d 293 (2001).....	14
<i>State v. Short,</i> 113 Wn. 2d 35, 775 P.2d 458 (1989).....	17
<i>State v. Stayton,</i> 39 Wn. App. 46, 691 P.2d 596 (1984).....	23
<i>State v. Theroff,</i> 25 Wn. App. 590, 608 P.2d 1254 (1980).....	21
<i>State v. Wilson,</i> 113 Wn. App. 122, 52 P.3d 545 (2002).....	7

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	15, 16
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	14
<i>Vance v. Dept. of Licensing</i> , 116 Wn. App. 412, 65 P.3d 668 (2003).....	13, 14

STATUTES

RCW 10.93.070	12
RCW 10.93.120	13
RCW 46.20.349	14
RCW 46.61.024(2).....	23
RCW Ch. 10.93	13

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly denied Bresler's untimely oral motions for arrest of judgment and new trial?
2. Whether venue and jurisdiction were proper in Kitsap County?
3. Whether Bresler fails to show any basis for suppressing his statement to Deputy Anglin?
4. Whether testimony that Bresler and Deputy Anglin had a conversation about why Bresler had been stopped and Bresler's comment that he was not going back to jail before speeding off was sufficient for the jury to find that Bresler acted willfully in attempting to elude the deputy, regardless of Bresler's contrary version of the events?
5. Whether the trial court properly declined to give Bresler's knowledge instruction because it misstated the law?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Daniel Bresler was charged by information filed in Kitsap County Superior Court with attempting to elude a pursuing police vehicle, making a false or misleading statement to a public official, and third-degree driving while license suspended or revoked. CP 13. The jury acquitted Bresler of making a false statement, but convicted on the remaining charges. CP 90.

B. FACTS

Jefferson County Deputy Sheriff Brett Anglin was on patrol duty at 3:29 a.m. on January 3, 2008. 1RP 50. He was parked along Highway 104, which leads to the Hood Canal Bridge, on the Jefferson County side of the bridge. 1RP 50-51. Anglin was in his patrol vehicle, a 2005 Ford Crown Victoria with Jefferson County Sheriff's emblem on the side and back. 1RP 49, 53. It had a fully functional light bar on top, and lights in the grill and on the rear of the vehicle. 1RP 49. It was equipped with a siren. 1RP 49. Anglin was wearing his uniform. 1RP 53. It had patches on the shoulders and a badge identifying him as a sheriff's deputy. 1RP 49.

That morning, he was "running license plates." 1RP 51. He had his headlights on and used a pair of binoculars to view the license plate numbers. 1RP 51. He then entered the numbers into his in-car computer. 1RP 51. The computer would tell him who the registered owner was, and the driving status of the registered owner. 1RP 51.

One vehicle came back registered to the defendant, Daniel Bresler. 1RP 52. It indicated that Bresler's license was suspended in the third degree. 1RP 52. Anglin also learned that Bresler had outstanding misdemeanor warrants for his arrest. 1RP 53. When he gained this information, Anglin turned around and followed Bresler's car, which was headed east on the bridge. 1RP 53. He also contacted dispatch to confirm the warrants. 1RP

53.

The speed limit was 40 miles per hour. 1RP 53. Anglin was initially going about 80, but had to accelerate beyond that. 1RP 54. He had not yet turned his lights and siren on because he was waiting for confirmation on the warrants, and because the bridge was not a safe place to conduct a stop. 1RP 54. Anglin was about at the end of the bridge when he was informed that the warrant was valid. 1RP 54. Anglin had to drive at over a hundred miles per hour to catch up with the car. 1RP 54. By the end of the bridge he had come within a hundred feet of it. 1RP 55.

At the traffic light on the Kitsap side of the bridge, the driver signaled left to follow Highway 104, but quickly turned right onto Highway 3. 1RP 55. Then he made another quick turn onto Bridge Way. 1RP 55.

Once on Bridge Way the driver stopped the car in the middle of the roadway and turned off its lights. 1RP 55. Anglin then activated his overhead lights. 1RP 56. Anglin parked his vehicle two or three car-lengths away. 1RP 56. Anglin exited his vehicle and approached the other car with his flashlight. 1RP 56. The car's motor was still running as he approached. 1RP 56. There were no passengers in the car, just a large German shepherd sitting up in the passenger seat. 1RP 56.

When he first approached, the driver would only roll the window

down about an inch. 1RP 58. Anglin requested that he roll it down further, but the driver refused. 1RP 59. Anglin informed him that he was a sheriff's deputy, and that he was stopping him because the registered owner had warrants and a suspended license. 1RP 57, 96. Anglin asked the driver if he was Bresler. 1RP 57. The driver replied that he was not, and asked why he had been stopped. 1RP 57. Anglin asked the driver for ID, who responded that he did not have any. 1RP 57. He asked him his name, which he stated was Bolland. 1RP 57.

The driver then again asked why he had been stopped. 1RP 58. Anglin did not again explain why he had stopped him. 1RP 58. Because the driver has the same height, weight, hair and eye color, Anglin believed he was Bresler. 1RP 58. After he concluded that the driver was actually Bresler, Anglin told him he knew who he was, and asked him to step out of the car. 1RP 58. Bresler responded that he was not going back to jail, and put the Buick in drive and sped down Bridge Way. 1RP 59.

Anglin returned to his car, turned on his lights and siren, and pursued Bresler. 1RP 59, 61. At the end of Bridge Way was a construction site for the Hood Canal Bridge. 1RP 59. Bridge Way dead-ended there, but there was a dirt access road for the construction workers. 1RP 59. Bresler proceeded at a high rate of speed down the dirt road, which looped around and fed onto the bridge. 1RP 59. Bresler drove over a large bump in the road

and onto the bridge. 1RP 59. The dirt road was quite bumpy and slippery. 1RP 60. There was a large bump where it came onto the bridge. 1RP 60. It was dark out at 3:30 a.m. 1RP 60. It had been raining earlier, and the roads were still somewhat wet. 1RP 60. Bresler went over the final bump before the bridge at a quite excessive speed. 1RP 60. His dog came off the seat and hit the roof of the car. 1RP 60.

Bresler continued between the Jersey barriers and then passed a car and took a right back onto Highway 104. 1RP 60. He did not stop, slow, or signal before turning onto the highway. He continued at a high rate of speed. 1RP 61. Anglin had to slow down before the bump because he felt it would be unsafe for him to go as fast as Bresler had. 1RP 61. By the time he got onto the road, Bresler was following Highway 104 as it turned left toward Port Gamble. 1RP 61.

Another vehicle stopped in the middle of the road to let them pass, and Anglin continued through the red light and turned toward Port Gamble at about 100 miles per hour. 1RP 61. The vehicle that had stopped, which was in the eastbound lane (toward Kitsap County), had the right of way, but stopped because of Bresler's speed and Anglin's lights. 1RP 62.

There was a tanker truck about to go through the intersection when Bresler ran the red light. 1RP 62. Bresler did not stop or slow down or

signal. 1RP 62. After passing the tanker truck, Anglin was not able to gain on Bresler, even though he was driving in excess of 100 miles per hour. 1RP 64.

Anglin lost sight of him, which was when he decided not to continue, because he did not want to endanger anyone. 1RP 64. Anglin waited for multiple units to arrive, and they checked the side roads to make sure he had not pulled off on the way to Port Gamble. 1RP 65. They located the car backed in between two driveways. 1RP 65. It was stuck in the mud and surrounded by blackberry bushes. 1RP 65. When Anglin arrived, Bresler was standing beside his car, which was not running. 1RP 65-66.

Anglin approached Bresler and told him to get on the ground. 1RP 66. Bresler responded that he did not want to and that he wanted a state trooper to respond to the scene. 1RP 66. There was only one other Kitsap County Sheriff's deputy at the scene at that time. 1RP 70. Anglin again asked Bresler to lie down. 1RP 71. When he again refused, Anglin told him that if he did not comply, he would be forced to taser him. 1RP 71. Bresler again failed to comply, so Anglin used his taser and completed the arrest. 1RP 71.

Bresler testified that he did not know that Anglin was police officer. 2RP 137-42.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DENIED BRESLER'S UNTIMELY ORAL MOTIONS FOR ARREST OF JUDGMENT AND NEW TRIAL.

Bresler argues that the trial court erred in denying his motions for arrest of judgment (based on alleged lack of jurisdiction), and for a new trial (based on the failure to hold a CrR 3.5 hearing). This claim is without merit because Bresler's oral motions were untimely and not in proper written form.

The grant or denial of a motion for a new trial is within the sound discretion of the trial court and will be reversed only for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Denial of an untimely motion is not an abuse of discretion. *State v. Wilson*, 113 Wn. App. 122, 135, 52 P.3d 545 (2002).

Here, the jury returned a verdict finding Bresler guilty on September 25, 2008. CP 90. Bresler did not challenge that verdict, and then only orally, until November 21, 2008. RP (11/21) 5-6.

The court observed that the actual eluding occurred in clearly occurred in Kitsap County, and that jurisdiction was therefore not in issue. RP (11/21) 12. The court also noted that the motion for new trial was not filed in the proper written form. RP (11/21) 13. It further noted that the CrR 3.5 hearing was arguably waived. RP (11/21) 13. The substance of these

ruling will be addressed in succeeding parts of this brief. However, the trial court would properly have denied both motions as untimely and for failure to be filed and served.

An appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Both CrR 7.4 (arrest of judgment) and CrR 7.5 (new trial) provide that the motion "must be served and filed within 10 days after the verdict or decision." CrR 7.4(b); CrR 7.5(b). As noted above, it is no abuse of discretion to deny an untimely motion. Moreover, both rules clearly contemplate a written motion – obviously an oral motion can be neither "filed" nor "served." The trial court would thus have been in within its discretion to deny the motions for that reason as well.

**B. VENUE AND JURISDICTION WERE PROPER
IN KITSAP COUNTY.**

Bresler claims that venue was improper and that the trial court lacked jurisdiction over him. These claims are without merit.

1. *Bresler waived any claim of improper venue by failing to raise a timely objection.*

State v. Dent, 123 Wn.2d 467, 869 P.2d 392 (1994), sets forth a comprehensive discussion of venue. The salient points are as follows:

Proof of venue is not an element of the crime, but is a matter of determining the proper forum before which a defendant may be tried. *Dent*, 123 Wn.2d at 479. Venue need not be proved beyond a reasonable doubt. *Id.* Nor is direct evidence of venue required. *Id.* Inferences from circumstantial evidence may establish proper venue. *Id.* Indeed, the court may take judicial notice of proper venue and not submit the question to the jury. *Id.*

In the usual case, the defendant is required to raise the venue question at the omnibus hearing. *Dent*, 123 Wn.2d at 480. Unless the defendant makes a showing of good cause for not raising the issue at the omnibus hearing, failure to do so constitutes a waiver. *Id.* Two exceptions apply to this rule.

The first is under CrR 5.1(b), which provides that where there is a reasonable doubt as to the county in which the offense was committed, the defendant has the right to have venue changed to any county where the offense may have been committed. CrR 5.1(c), however, requires that a defendant take advantage of this provision “as soon after the initial pleading is filed as the defendant has knowledge” that venue may be changed. The

Supreme Court in *Dent* described this provision as “strictly time limited.”
Dent, 123 Wn.2d at 480 (*citing* CrR 5.1(c)).

The second objection is where there is evidence introduced during the trial that may raise a question of venue for the first time. *Dent*, 123 Wn.2d at 480. To avoid waiver, the defendant must raise the issue at the end of the State’s case.¹ *Id.*

Here, Bresler did not raise the issue until over a month after the jury’s verdict. Under any of the scenarios discussed above, he has waived any claim that venue was improper.

Bresler’s reliance on *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998), is misplaced. That case merely applied the familiar doctrine of law of the case: if a non-essential element is included in the to-convict instruction without State objection, the State assumes the duty to prove that element. *See Hickman*, 135 Wn.2d at 102. In *Hickman*, because venue was included in the to-convict instruction, the Court went on to consider whether the evidence of that “element” was sufficiently proved. *Hickman*, 135 Wn.2d at 105-06. Notably, however, *Hickman* reiterates the rule that under ordinary circumstances venue is not an element of the offense. *Hickman*, 135 Wn.2d

¹ Part of the reason for this timing is that if the defendant demonstrates a lack of any proof, the court should permit reopening, unless the defendant makes a showing of actual prejudice. *Id.*

at 105 (citing *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994)).

2. *Venue was proper in Kitsap County.*

Even had Bresler not waived this issue, it would be without merit. As noted in *Dent*, Const. art. 1, § 22 provides that the defendant has a right “to have a ... trial by an impartial jury of the county in which the offense is charged to have been committed.” This constitutional guarantee is effectuated through CrR 5.1, which provides:

(a) Where Commenced. All actions shall be commenced:

- (1) In the county where the offense was committed;
- (2) In any county wherein an element of the offense was committed or occurred.

Here, the information alleged that the offenses occurred in Kitsap County. CP 13-17. Further, the evidence at trial also showed that all the relevant acts occurred in Kitsap County. While the crime of driving with a suspended license was undoubtedly also proven to have occurred in Jefferson County, there is no doubt, reasonable or otherwise, that every element of each of the offenses of which Bresler was convicted occurred in Kitsap County. Venue was proper.

3. *The trial court’s jurisdiction was established when Bresler appeared in court and pled not guilty to a properly filed information filed in Kitsap County Superior Court.*

Bresler’s jurisdiction argument begins on page 16 of his brief, and contends that the trial court lacked jurisdiction because Jefferson County

Deputy Anglin lacked authority to pursue Bresler into Kitsap County.

First, even accepting the notion that Bresler was improperly arrested, that fact would be irrelevant. The long-settled rule in Washington, as elsewhere, is that if an arrest is invalid, but the defendant enters a plea of not guilty and is in court on the day of trial, the court has jurisdiction of his person. *Mercer Island v. Crouch*, 12 Wn. App. 472, 474, 530 P.2d 344 (1975) (collecting cases). Where the court has jurisdiction of the person of a defendant, it is not a ground for quashing or dismissing a criminal prosecution that he was not lawfully arrested. *Id.* Further, the trial court's jurisdiction arises from the filing of a valid charging document, not from an arrest. *Crouch*, 12 Wn. App. at 475. Therefore, the jurisdiction of the court was not destroyed by Bresler's allegedly invalid arrest. *Id.*

Furthermore, the contention that Bresler's arrest was unlawful is legally without merit. RCW 10.93.070 provides:

In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

* * *

(5) When the officer is executing an arrest warrant or search warrant; or

* * *

(6) When the officer is in fresh pursuit, as defined in RCW 10.93.120.

RCW 10.93.120 provides:

(1) Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person (a) who is reasonably believed to have committed a violation of traffic or criminal laws, or (b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.

(2) The term “fresh pursuit,” as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

Here, Deputy Anglin determined that Bresler’s license was suspended and that he had an outstanding warrant. 1RP 52-53. Bresler was the registered owner of the car Anglin observed. 1RP 52. As soon as Anglin became aware of this information, he proceeded after Bresler’s vehicle. 1RP 53.

Under similar circumstances, this Court has rejected the claim that the officer was not in fresh pursuit. In *Vance v. Dept. of Licensing*, 116 Wn. App. 412, 415, 65 P.3d 668 (2003), the Court specifically rejected the argument that a pursuit was not valid under the statute because the common law definition of fresh pursuit required that the suspect know he is being pursued. *Id.* Instead, the Court concluded that amendments to RCW Ch. 10.93 were intended to abrogate the common-law rule. *Id.* The Court

specifically cited the codified legislative intent, which sets forth the reasons for the fresh pursuit statute:

“[C]urrent artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state and federal agencies be modified pursuant to this chapter. This chapter shall be liberally construed to effectuate the intent of the legislature to modify current restrictions upon the limited territorial and enforcement authority of general authority peace officers”

Vance, 116 Wn. App. at 416 (citing RCW 10.93.001). Thus, the Court further noted that under the statute, “courts are not limited by the common law definition, but may consider the Legislature’s overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable.” *Vance*, 116 Wn. App. at 416 (quoting *Tacoma v. Durham*, 95 Wn. App. 876, 881, 978 P.2d 514 (1999)).

RCW 46.20.349 provides:

Any police officer who has received notice of the suspension or revocation of a driver’s license from the department of licensing, may, during the reported period of such suspension or revocation, stop any motor vehicle identified by its vehicle license number as being registered to the person whose driver’s license has been suspended or revoked.

This statute is constitutional under *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), because the law enforcement officer has an articulable suspicion of criminal conduct: that the driver is the registered owner who has a suspended license. *State v. Penfield*, 106 Wn. App. 157,

161, 22 P.3d 293 (2001). Because the deputy had a reasonable basis to believe that Bresler was the driver of his own car, he clearly had the authority to effectuate a traffic stop to investigate whether Bresler was driving with a suspended license and to execute the outstanding warrant for his arrest. Under the statute, Anglin was further authorized to cross from Jefferson to Kitsap counties to effectuate that stop, since he did so without unreasonable delay. The pursuit and attempted stop were thus proper, as Bresler all but concedes in his brief. Brief of Appellant at 16-18. These claims should be rejected.

C. BRESLER FAILS TO SHOW ANY BASIS FOR SUPPRESSING HIS STATEMENT TO DEPUTY ANGLIN.

Bresler next claims that his counsel was ineffective for not moving to suppress his statements to the deputy. Bresler fails to show either deficiency or prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v.*

Lord, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Although a more explicit record might have been desirable, it is quite apparent that counsel waived a CrR 3.5 hearing. *See* 2RP 206, 215. Bresler nevertheless now asserts that his statement, "I'm not going back to jail", should have been suppressed because he was not given *Miranda*² warnings before he made it. He further asserts that counsel was ineffective for not

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

objecting to the admission of the statements. The problem with his argument is that he fails to show that the statement was suppressible. Bresler was not in custody at the time he made the statement, and even if he were, it was not made in response to any question designed to elicit an incriminating statement. Since the statement would not properly have been suppressed, it follows that counsel was not deficient for waiving the suppression hearing, and that Bresler cannot establish prejudice.

A suspect is in custody, and therefore entitled to receive *Miranda* warnings, when the suspect's freedom of action is curtailed to a degree associated with formal arrest. *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1989); *State v. Ferguson*, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995). Bresler argues that he was in custody because he was not free to leave. Brief of Appellant at 21. But whether the suspect is free to leave is not the question. *Ferguson*, 76 Wn. App. at 566. Temporary detainment following a traffic stop does not constitute custody for purposes of *Miranda* -- regardless of the seriousness of the potential charge. *Ferguson*, 76 Wn. App. at 566-67.

Ferguson is on point. There, Ferguson was involved in a car accident. An off-duty sheriff's deputy arrived at the scene. *Ferguson*, 76 Wn. App. at 563. The deputy asked him if he had been drinking. Ferguson said he had. *Id.* A Washington State Patrol trooper arrived approximately 30 minutes later and was informed of the deputy's suspicions. *Id.* The trooper then asked

Ferguson if he had been drinking. And he again responded that he had. *Id.* Ferguson was arrested for vehicular homicide. *Ferguson*, 76 Wn. App. at 564. The deputy testified that Ferguson was not free to leave the scene of the accident. *Id.* This Court held that Ferguson was not in custody for purposes of *Miranda* when he was questioned by either law enforcement officer. *Ferguson*, 76 Wn. App. at 568. The court noted that the questions were brief, straightforward, and nondeceptive. *Id.*

Moreover, even were Bresler deemed to have been in custody, the statement was not made in response to any interrogation. After the stop, Anglin approached Bresler's car. Based on the driver's height, weight, hair and eye color, Anglin believed he was Bresler. 1RP 58. Anglin told him he knew who he was, and asked him to step out of the car. 1RP 58 Bresler responded that he was not going back to jail, and put the Buick in drive and sped down Bridge Way. 1RP 59.

This situation is analogous to that in *State v. McWatters*, 63 Wn. App. 911, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992). There, after an automobile crash, the officer went to the hospital to issue McWatters a citation for the accident. When the officer entered the hospital room, McWatters asked him about his money. The officer told him his money and drugs were placed on the property books for evidence, to which McWatters replied, "not all of the money was drug money." He was subsequently

charged with possession of a controlled substance. *McWatters*, 63 Wn. App. at 913.

On appeal, McWatters argued that the statement should have been suppressed. This Court disagreed. It noted that interrogation involves express questioning, words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an incriminating response. *McWatters*, 63 Wn. App. at 915 (citing *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Further, it pointed out that a defendant's incriminating statement that is not in response to an officer's question is freely admissible. *McWatters*, 63 Wn. App. at 915 (citing *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986)). Applying these principles, the Court concluded that the statement about "all the drug money" was spontaneous and admissible. *McWatters*, 63 Wn. App. at 916.

The present case is no different. Anglin asked Bresler to step out of the car. He responded by stating that he was not going back to jail. This spontaneous, non-responsive, non-custodial statement was clearly admissible. Counsel was thus within the broad range of competent conduct when he waived the hearing. This claim should be rejected.

D. TESTIMONY THAT BRESLER AND DEPUTY ANGLIN HAD A CONVERSATION ABOUT WHY BRESLER HAD BEEN STOPPED AND BRESLER'S COMMENT THAT HE WAS NOT GOING BACK TO JAIL BEFORE SPEEDING OFF WAS SUFFICIENT FOR THE JURY TO FIND THAT BRESLER ACTED WILLFULLY IN ATTEMPTING TO ELUDE THE DEPUTY, REGARDLESS OF BRESLER'S CONTRARY VERSION OF THE EVENTS.

Bresler next claims that the evidence was insufficient to show that he acted willfully.³ Viewed in light of the controlling standard of review, the evidence was more than sufficient.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the

³ Bresler also briefly observes that the to-convict instructions did not ask the jury to determine whether the offenses occurred in Kitsap County. Brief of Appellant at 26. Bresler fails to elaborate on this observation, however, and it should be disregarded. Moreover, as discussed above, venue is not an element of the offense. As for jurisdiction, the jury was told that the offense must have occurred in the State of Washington. CP 84.

prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, Bresler argues that the evidence did not show he acted willfully because he maintained that he was unaware that Anglin was a deputy. The jury was free to reject that self-serving testimony, however, and consider all the circumstances, including Deputy Anglin's testimony.

Anglin testified that he was driving a Ford Crown Victoria with Jefferson County Sheriff's emblem on the side and back. The car had a fully functional light bar on top, and lights in the grill and on the rear of the vehicle and was equipped with a siren. Anglin wore a uniform that had patches on the shoulders and a badge identifying him as a sheriff's deputy.

When Anglin first attempted to catch up with Bresler, he was initially going about 80, but had to accelerate beyond that, driving at over a hundred miles per hour to catch up. At the traffic light on the Kitsap side of the bridge, Bresler signaled left, but quickly turned right. Bresler then made another quick turn onto a dark side road and stopped his car in the middle of the roadway and turned off his lights. Anglin followed him down the side road and then activated his overhead lights.

Anglin exited his vehicle and approached Bresler with his flashlight. Bresler's motor was still running as he approached. Anglin informed Bresler that he was a deputy sheriff and asked him if he was Bresler. Bresler replied that he was not, and asked why he had been stopped. Anglin informed him that he had stopped him because the registered owner of his car had a suspended license and outstanding warrants.

Anglin asked Bresler for ID, who responded that he did not have any. Bresler told Anglin his name was Bolland. Bresler then again asked why he had been stopped. Anglin responded that he knew who Bresler was, and asked him to step out of the car. Bresler responded that he was not going back to jail, and put the car in drive and sped away.

If the jury accepted this account of events, which it plainly did, the evidence clearly was sufficient for it conclude that Bresler knew Anglin was a

police officer, and that he acted willfully in attempting to elude him. This claim is without merit.

E. THE TRIAL COURT PROPERLY DECLINED TO GIVE BRESLER'S KNOWLEDGE INSTRUCTION BECAUSE IT MISSTATED THE LAW.

Bresler's final claim is that the trial court erred in denying a defense instruction that proposed the addition of an element to the "to-convict" instruction that the defendant knew that the deputy was a law enforcement officer. This claim is without merit because the proposed instruction would have misstated the law.

Bresler is correct that *State v. Stayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984), held that knowledge that the pursuing vehicle is a police vehicle is an element of the crime attempting to elude. The eluding statute, however, was amended in 2003. Laws of 2003, ch. 101, § 1. The amendment, *inter alia*, added the following provision:

It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

RCW 46.61.024(2). Bresler's proposed additions to the standard instruction read as follows:

(5) That the defendant knew the signal to stop was give

[sic] by a police officer.

- (7) That the defendant knew the pursuing police vehicle was a police vehicle.

CP 23.

His proposal was defective in several regards. It placed the burden on the State to prove knowledge beyond a reasonable doubt, while the statute places the burden on the defense to prove a lack of knowledge by a preponderance. It wholly omits the reasonable person standard from the knowledge aspect. Finally, it wholly omits the requirement that the driving itself have been reasonable.

Thus, the trial court did not err in denying Bresler's proposed jury instruction because it misstated the law. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, he is not entitled to an instruction that inaccurately represents the law. *State v. Hoffman*, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991). Moreover, a court does not have to give an instruction that is erroneous in any respect. *State v. Ellis*, 48 Wn. App. 333, 335, 738 P.2d 1085 (1987).

Because Bresler's proposed instruction was a misstatement of the law, the trial court did not err in refusing to give it. This claim should be rejected.

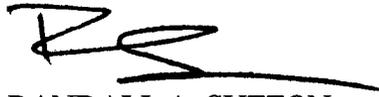
IV. CONCLUSION

For the foregoing reasons, Bresler's conviction and sentence should be affirmed.

DATED September 2, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney